Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
1996 TERM

WAYNE A. LUNDQUIST, JR., PETITIONER

-VS-

PREMIER FINANCIAL SERVICES - TEXAS, L.P.,
RESPONDENT

APPENDIX

TO

PETITION FOR A WRIT OF CERTIORARI

Shelby A. Jordan
JORDAN, HYDEN, WOMBLE AND CULBRETH, P.C.
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ATTORNEY IN CHARGE FOR PETITIONER

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54 pp

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 96-40079
Summary Calendar

PREMIER FINANCIAL SERVICES - TEXAS L. P.,
Plaintiff-Counter Defendant-Appellee,

VERSUS

WAYNE A. LUNDQUIST, JR., ET AL.,
Defendants,

WAYNE A. LUNDQUIST, JR.,
Defendant-Counter ClaimantAppellant.

Appeal from the United States District Court
For the Southern District of Texas
(C-94-CV-545)

Before JONES, DeMOSS, and PARKER, Circuit Judges.

PER CURIAM*

On July 26, 1996, this Court stayed further

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* Pursuant to Local Rule 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

consideration of this appeal pending an order of the United States Bankruptcy Court for the Southern District of Texas lifting the automatic stay of that court in the Chapter 11 bankruptcy proceeding No. 96-22457-C11 filed by appellant Wayne A. Lundquist, Jr. Such automatic stay has now been lifted by the bankruptcy court and we proceed with consideration of this appeal.

Premier Financial Services - Texas L.P. ("Premier") sued Wayne A. Lundquist, Jr. ("Lundquist") and others on a written guaranty agreement executed by Lundquist, guaranteeing the payment of a promissory note dated October 24, 1983, executed by Nueces Development Company payable to Victoria Savings Association in the original principal sum of $793,000 one year after date. The maturity date of this note was ultimately extended by various renewal and extension agreements until September 19, 1987. The Resolution Trust Corporation ("RTC") was appointed conservator of Victoria Savings Association on June 29, 1989. In December 1990, after making demand on the maker and Lundquist for payment of this note, the RTC proceeded to foreclose upon the secured property and sold the secured property at public auction for the sum of $161,028, which was credited against the note. In January 1994, the RTC as receiver for Victoria Savings Association FSA. transferred the note and guaranty, along with all right, title and interest therein, to Premier. On December 16,

1994, Premier brought this suit upon his guaranty against Lundquist seeking to
the remaining amounts due and owing on the note. In September 1995, Premier moved for a summary judgment on its claims against defendant Lundquist and on Lundquist's counterclaim against Premier. On December 6, 1995, the district court granted Premier's motion for a summary judgment and by a corrected final judgment entered under date of December 29, 1995, granted recovery in the amount of $606,345.08 against Lundquist.

We have carefully reviewed the briefs, the record excerpts and relevant portions of the record itself; and for the reasons stated by the district court in its order granting motion for summary judgment entered under date of December 6, 1995, we affirm the final judgment entered under date of December 29, 1995.

AFFIRMED.

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 96-40079

PREMIER FINANCIAL SERVICES - TEXAS L. P.,
Plaintiff-Counter Defendant-Appellee,

v.

WAYNE A. LUNDQUIST, JR., ET AL.,
Defendants,

WAYNE A. LUNDQUIST, JR.,
Defendant-CounterClaimant-Appellant.

Appeal from the United States District Court
For the Southern District of Texas, Corpus Christi

Before JONES, DeMOSS, and PARKER, Circuit Judges.

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT: (Filed December 5, 1996)

/S/ Harold R. DeMoss

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

PREMIER FINANCIAL SERVICES - TEXAS, L.P., Plaintiff	§	
	§	C.A. No. C-94-545
VS.	§	
WAYNE A. LUNDQUIST, JR. and JAMES E. GUNN, Defendants.	§	

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

On this date came on to be considered a Motion for Summary Judgment by Plaintiff Premier Financial Services - Texas, L.P. ("Premier") against Defendant Wayne A. Lundquist ("Lundquist").

I. JURISDICTION

This Court has jurisdiction on the basis of diversity of citizenship of the parties pursuant to 28 U.S.C. § 1332.

II. FACTS AND PROCEEDINGS

On October 24, 1983, Nueces Development Company ("Debtor") executed and delivered to Victoria Savings Association a Promissory Note ("Note") whereby Debtor promised to pay unto the order of Victoria Savings Association the principal sum of

$793,000.00, together with interest thereon on or before the expiration of 365 days from the date of the execution of the Note. The Note was subsequently extended and renewed by various extension and renewal agreements dated November 21, 1984, July 24, 1984, July 22, 1986, and March 30, 1987. Pursuant to the terms of the last extension and renewal agreement, the Note matured on September 19, 1987.

Also on October 24, 1983, Nueces Development Company executed and delivered a Deed of Trust Security Agreement Financing Statement-("Deed of Trust"), conveying to the Trustee for the benefit of Victoria Savings Association, and its successors and assigns, certain property as security for the debt owed on the Note. Further, on that same date, Defendant Lundquist, along with others, by and through a Guaranty Agreement ("Guaranty"), individually guaranteed in writing the payment of the indebtedness evidenced by the Note.

The Resolution Trust Corporation ("RTC") was appointed conservator of Victoria Savings Association on June 29, 1989. On December 11, 1990, in its capacity as conservator of Victoria Savings Association, the RTC made demand upon Nueces Development Company and Defendant Lundquist for payment of the Note. Both Nueces Development Company and Lundquist failed to meet such demand. As a result, the RTC proceeded with

the foreclosure sale of the secured property pursuant to the terms of the Deed of Trust. The property sold at public auction for the sum of $161,028. After the application of the sale price to the unpaid balance on the Note, a balance of $606,345.08 remained due and owing on the Note, including principle, interest, and attorney's fees.

On January 14, 1994, the RTC as receiver for Victoria Savings Association, F.S.A., transferred the subject Note and Guaranty, along with all right, title and interest therein to Plaintiff Premier. On December 16, 1994, Premier brought this cause of action to recover the amount owed and due plus interest against Defendant Lundquist based upon his guarantee of the note.

On June 14, 1995, this Court granted Defendant's motion for leave to file a first amended answer, affirmative defenses, and counterclaim ("first amended answer") Defendant's first amended answer is the only proper pleading before this Court at this time In the first amended answer, Defendant raises the following affirmative defenses to Plaintiff's cause of action: (1) Texas's four-year statute or in the alternative, the doctrine of laches bars Plaintiff's suit; (2) wrongful foreclosure; and (3) usury As a counterclaim, Defendant asserts that the Guaranty Agreement is usurious on its face.

On September 20, 1995, Premier moved for Summary Judgment on its entire claim against Defendant Lundquist, and on Defendant Lundquist's counterclaim against Plaintiff for usury. On October 13, 1995, Plaintiff supplemented its Motion for Summary Judgment with a Reply to Defendant's Response to Premier's Motion for Summary Judgment.

III. DISCUSSION

A. Standard for Summary Judgment

Summary judgment is proper, pursuant to FED.R.CIV.P. 56(c), when "the pleadings, depositions, answers to interrogatories, and admissions file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." A party seeking summary judgment bears the initial burden of informing the Court of the basis for its motion and of identifying those portions of the record and affidavits which evidence an absence of material fact. Celotex Corp. v Catrett, 477 U.S. 317, 324 (1986). Once the movant has met its burden, it is then incumbent upon the non-movant to show that disputed issues of fact remain State Farm Life Ins. Co. v. Gutterman, 896 F 2d 116, 118 (5th Cir 1990). The Court, in turn, must view all inferences from the evidence in the light most favorable to the non-movant. Anderson v. Liberty Lobby Inc., 477 U.S. 242, 255 (1986).

The movant's summary judgment evidence must sufficiently indicate the failure of an essential element of the non-movant's claim. Celotex Corp., 477 U.S. at 322. A complete failure of proof on an essential element renders all other facts immaterial because there is no longer a genuine issue of material fact. Id. at 323. Rule 56(c) requires the Court to enter summary judgment if the evidence favoring the non-moving party is not sufficient for the jury to enter a verdict in his favor. Anderson, 477 U.S. at 249.

In proceedings under Rule 56(c), documents and exhibits identified by affidavit may be submitted to support a motion for summary judgment. First Nat'l Bank Co. of Clinton Ill. v Insurance Co of North Am., 606 F.2d 760, 766 (5th Cir. 1979). Along with its Motion for Summary Judgment, Premier provided an affidavit of Lisa A. Bullock, an asset manager of Premier, which identified copies of the Note, Guaranty, loan agreement, Deed of Trust, and the renewal and extension agreements. In Defendant's First Amended Response to Premier's Motion for Summary Judgment, Lundquist provided an Affidavit by Robert Thorpe and himself.

B. Defendant's Usury Counterclaim and Affirmative Defense

As an affirmative defense and counterclaim, Defendant maintains that the Guaranty constitutes a contract for, or a charge of, interest in a greater amount

than permitted by law. Under Texas law, usury is defined as "interest in excess of the amount allowed by law." TEX.REV.CIV.STAT.ANN art 5069-1.01(d). The essential elements of a usurious transaction are (1) a loan of money; (2) an absolute obligation that the principal be repaid; and (3) the extraction from the borrower of a greater compensation than the amount allowed by law for the use of money by the borrower. Holley v. Watts, 629 S.W.2d 694, 696 (Tex. 1982).

Where a transaction appears lawful on its face, the party claiming usury has the burden of proof. American Century Mortgage Investors v Regional Center. Ltd., 529 S.W.2d 578, 583 (Tex.Civ.App.--Dallas 1975, writ ref'd n.r.e.). Conversely, where the loan instruments show on their face that the loan is usurious, the lender has the burden to prove that the terms of the loan resulted from accidental and bona fide error. Miller v. First State Bank, 551 S.W.2d 89, 99 (Tex.Civ.App.--Fort Worth 1977), modified on other grounds, 563 S.W.2d 572 (Tex. 1978). Here, the Court finds that the Guaranty appears lawful on its face, and therefore, Lundquist has the burden of proof on the claim of usury See, American Century Mortgage Investors, 529 S.W.2d at 583.

The Court finds that Lundquist has not met his burden of proof He offers no credible evidence establishing that the Guaranty is usurious or that the any of the elements for a claim of usury have been satisfied.

Lundquist contends that the Guaranty is usurious since, as written, it provides for his liability even if the Debtor has satisfied its obligations under the Note. To support this allegation, Lundquist directs the Court's attention to language in the Guaranty providing that if the

> Borrowers are not liable, for any reason, for any reason, for the amounts due or which may become due under the said promissory note . . such facts shall in no manner affect the liability of the Guarantors hereunder, but the Guarantors shall be and remain liable herein notwithstanding said Borrowers be not liable for such indebtedness, and to the same extent as the Guarantors would have been liable if the indebtedness of said Borrower has been enforceable against them.

(Pl.'s Mot Summ. J Ex. A-2, Guaranty Agreement at 2). This Court disagrees with Defendant's construction of the Guaranty since it previously found that such interpretation of the Guaranty Agreement was unconvincing at best when the Court denied Defendant's motion for summary judgment on his counterclaim for usury on July 24, 1995.

Further, even assuming Defendant presented some evidence that the Guaranty is usurious, this claim would fail as a matter of law since the Guaranty refers to the Note which contains a usury savings clause. Texas

courts have repeatedly acknowledged the validity of usury savings clauses and enforce such clauses to defeat violations of the usury laws. Woodcrest v. Commonwealth Mortgage, 775 S W 2d 434, 437 (Tex. App --Dallas 1989). The Court examines the usury savings clause in the Note because "[t]he question of usury must be determined by a construction of all the documents constituting the transaction, interpreted as a whole, and in light of the attending circumstances." Tygrett v University Gardens Homeowners' Ass'n, 687 S W 2d 481, 485 (Tex.App.--Dallas 1985, writ ref'd n.r.e.). The usury savings clause reads as follows:

> All agreements between Maker and Payee are expressly limited so that no contingency or event whatsoever shall the amount paid, or agreed to be paid, to Payee for the use, forbearance, or detention of the money to be lent hereunder exceed the maximum amount permissible under applicable law. If, from any circumstances whatsoever, fulfillment of any provision hereof at the time such performance is due would involve transcending the limit of validity prescribed by law, then ipso facto the obligation to be fulfilled shall be reduced to the limit of such the obligation to be fulfilled shall be reduced to the limit of such validity, and if from any circumstances Payee shall receive as interest an amount that would exceed the highest lawful rate, such amount that would be excessive interest shall be applied to the reduction of the principal

amount owing hereunder, or shall be refunded, but shall not be applied to payment of interest.

(Pl.'s Mot. Summ. J. Ex. A-l, Promissory Note at 1).

The Court finds that the preceding provision in the Note constitutes a valid usury savings clause. As such, even if Lundquist could show some evidence that the Guaranty Agreement is usurious, this claim would fail since the Court would enforce the usury savings clause to defeat a violation of the usury laws.

Accordingly, the Court GRANTS Plaintiff's Motion for Summary Judgment on Defendant's usury counterclaim, and affirmative defense.

B. Plaintiff's Claim Under Guaranty Agreement

Premier moves for summary judgment on its claim against Defendant Lundquist under the Guaranty Agreement To prevail in its motion for summary judgment, Premier must establish that (1) Defendant executed the guaranty; (2) that the underlying note is in default; (3) that Plaintiff is the present holder of the guaranty; and (4) that a certain balance is due and owing. Sunbelt Sav. FSB. Dallas Tex. v Birch, 796 F.Supp. 991, 995 (N.D. Tex. 1992); Universal Metals and Machinery. Inc v Bohart, 539 S.W.2d 874, 877-78 (Tex. 1976).

In the present case, the uncontroverted facts establish all four elements for a cause of action under a guaranty agreement. First, on October 24, 1983, Defendant, along with others, executed the Guaranty

Agreement by individually promising in writing the payment of the indebtedness evidenced by the Note. Second, the underlying note is in default since Debtor and Defendant refused to pay the RTC the indebtedness under the Note when the RTC demanded payment. Third, Premier established that it is a holder of the Guaranty through the affidavit by Lisa E. Bullock. (Pl.'s Mot. Summ J. Ex. A). A party can show its status as an owner or the holder of a guaranty by offering an affidavit sworn copy of the Guaranty. Zarges v. Bevan, 652 S W 2d 368, 369 (Tex 1983); Life Ins. Co. v. Gar-Dal. Inc., 570 S.W 2d 378, 380 (Tex. 1979); State Sav. & Loan Ass'n v. Liberty Trust Co., 863 F 2d 423, 426 (5th Cir 1989) Fourth, the affidavit of Lisa E. Bullock establishes that a certain amount is due and owing under the Note--i.e., $606,345.08 together with interest from and after January 1, 1991, at the rate allowed by the laws as provided in the Note, together with costs (Pl 's Mot. Summ. J. Ex. A).

In addition, a district court may properly grant summary judgment when a contract is unambiguous, but may not grant summary judgment when a contract is ambiguous and the parties' intent presents a genuine issue of material fact. Southern Natural Gas Co. v. Pursue Energy, 781 F.2d 1079, 1081 (5th Cir. 1986); Union Planters National Leasing. Inc. v. Woods, 687 F.2d 117, 120 (5th Cir. 1982); Freeman v. Continental Gin Co, 381

F.2d 459, 465 (5th Cir. 1967). Pursuant to this principle, the Fifth Circuit has held that summary judgment is particularly appropriate for suits on promissory notes[1] and in cases where the language of a guaranty contract is clear.[2] This suit particularly invites summary judgment since it requires little more than this Court's interpretation of an unambiguous written guaranty agreement.

The Texas rules for interpreting guaranty agreements are well-established. In construing a guaranty contract, the primary concern for this Court is to ascertain the intent of the parties Coker v. Coker, 650-S.W.2d 391, 333 (Tex 1983). In order for a guaranty to be enforceable it must, with reasonable clearness, evidence an intent on the part of the party to become liable on an obligation in the event of default by the primary obligor. Block v. Aude, 718 S.W.2d 914, 915 (Tex.App --Beaumont 1986, no writ).

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1 FDIC v. Cardinal Oil Well Servicing Co. Inc., 837 F.2d 1369, 1371 (5th Cir. 1988) ("Typically suits on promissory notes provide fit grist for the summary judgment mill").

2 Resolution Trust Corp. v. Marshall, 939 F.2d 274, 276 (5th Cir. 1991).

If a guaranty is ambiguous, this Court must apply the "construction which is the most favorable to the guarantor." Coker, 650 S.W.2d at 394 n. 1. However, if the guaranty "can be given a certain or definite meaning or legal interpretation, then it is not ambiguous and the court will construe the contract as a matter of law." Coker, 650 S.W.2d at 393. When a guaranty's terms are plain and unambiguous, a federal court will enforce the guaranty according to those terms. NCNB Texas Nat. Bank v. Johnson, 11 F.3d 1260, 1266 (5th Cir.), reh'g denied, 19 F.3d 17 (5th Cir. 1994).

Under Texas law, the rule of strictissimi juris applies after the terms of the guaranty agreement have been ascertained McKnight v. Virginia Mirror Co., 463 S.W.2d 428, 430 (Tex. 1971). This rule prohibits the extension of the guarantor's obligations by implication beyond the written terms of the agreement. Clark v. Walker-Keith Lumber Co., 689 S.W.2d 275, 278 (Tex.App.-- Houston [1st Dist.] 1985, writ ref'd n.r.e.). However, this rule does not abrogate the principle applicable to all contracts that, in their interpretation, the Court must ascertain the true intent of the parties who executed them Preston Ridge Financial Services Corp. v Tyler, 796 S W 2d 772, 780 (Tex App --Dallas 1990, reh'g denied).

Applying these settled rules of contract construction to the Guaranty Agreement, the Court finds

that the parties' intent is clear that Defendant Lundquist is to be held liable as a guarantor for indebtedness evidenced by the Note. The plain language of the guaranty states:

> In the event that any one or more of the Borrowers are not liable, for any reason, for the amounts due or which may become due under said promissory note, or in the event the said promissory note cannot be enforced against any one or more of the Borrowers, then, in any such event, such facts shall in no manner affect the liability of the Guarantors hereunder, but the Guarantors shall be and remain liable for such indebtedness, and to the same extent as the Guarantors would have been liable if the indebtedness of said Borrowers has been enforceable against them.

(P.'s Mot. Summ. J. Ex. A-2, Guaranty Agreement at 2-3).

Thus, the unambiguous language of this provision provides that the Defendant Guarantor is liable for the "indebtedness" under the Note if the borrowers are not liable "for any reason" for "the amounts due or which may become due" under the Note. This provision also shows no expression of intent to hold the Defendant Guarantor liable if the Note has been paid. Specifically, the Guaranty Agreement provides that "the Guarantors shall be and remain liable for such indebtedness ... to the same extent as the Guarantors would have been liable if

the indebtedness of said Borrowers has been enforceable against them."

The undisputed facts establish the elements for a cause of action under the Guaranty Agreement, and the Court finds that the Guaranty Agreement is clear and unambiguous. Therefore, unless Defendant Lundquist establishes a valid affirmative defense, the Court shall issue summary judgment in favor of Premier.

C. Defendant's Affirmative Defenses

(a) Statue of Limitations Defense

Defendant asserts as an affirmative defense that Plaintiff's action is barred by Texas's four-year statute of limitations. See, Tex.Civ.Prac. & Rem Code. § 16.004(a)(3) (Vernon's 1986). Lundquist contends that this four-year limitations period ran on October 24, 1988--approximately four years after the Note's maturity date on October 23, 1984. Plaintiff argues that the four-year period does not bar this suit on the ground that this action is governed by the six-year statute of limitations period under the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA), 12 U.S.C. § 1821(d)(14).

FIRREA provides that the statute of limitations on contract claims is the longer of the six-year period beginning on the date the claim accrues or the period applicable under state law. See, 12 U.S.C. § 1821(d)(14)(A). The statue of limitations begins to run on

the date the FDIC[3] is appointed receiver or conservator or the date the cause of action accrues, whichever is later. See, 12 U.S C. § 1821(d)(14)(B)

As a general rule, a special federal limitations period will not revive a claim already barred under state law FDIC v Belli, 981 F.2d 838, 842 (5th Cir. 1993); Jackson v Thweatt, 883 S.W 2d 171, 177 (Tex.), cert. denied, 115 S.Ct 196 (1994). This rule does not apply in this case, however, as the claim against Lundquist was not stale against Lundquist when the RTC was appointed conservator of Victoria Savings Association on June 29, 1989. Under the last extension and renewal agreement, the Note matured on September 19, 1987. As a result, the RTC's claim against the Debtor, Nueces Development Company, and Lundquist for payment of the Note was not time barred under the Texas four-year statute of limitations period since the RTC was appointed conservator less than two years after Note matured under the last extension agreement.

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3 The RTC was appointed conservator of Victoria Savings Association on June 29, 1989 The RTC has the same rights and powers as the FDIC under 12 U.S.C. § 1821(d)(14)(A) and (B). When acting as receiver or conservator of an insured depository institution, the RTC is deemed to be an agent of the United States by virtue of the provisions of 12 U.S.C. § 1441a(b)(1)(A). Under the provision of 12 U.S.C. § 1441a(b)(4)(A), the RTC, as receiver, has the same rights and powers as does the FDIC under 12 U.S C §§ 1821-1823.

Since a cause of action for payment of the Note was not stale when the RTC was appointed conservator on June 29, 1989, the RTC obtained the benefits of the six-year limitation period under section 1821(d)(14). Even though FIRREA became effective on August 9, 1989, before the RTC was appointed conservator of Victoria Savings Association, the RTC still benefited from this 1821(d)(14)'s limitations period as the Fifth Circuit and Texas Supreme Court hold that this provision applies retroactively to causes of action in-existence when FIRREA was enacted on August 9, 1989. Davidson v. FDIC, 44 F.3d 246, 248 (5th Cir 1995); Belli, 981 F.2d at 842; Jackson, 883 S.W 2d at 177.

Here, it is established that Texas's four-year statute of limitations did not bar the RTC's action for payment under the note when it was appointed conservator. Therefore, since this claim existed on August 9, 1989, the RTC benefited from the six-year limitations period under section 1821(d)(14).

FIRREA's six-year limitations period applies to Premier's claim against Defendant Lundquist. The Fifth Circuit and the Texas Supreme Court hold that section 1821(d)(14) applies to actions brought by purchasers of assets from the FDIC or RTC pursuant to the common-law maxim that an assignee stands in the shoes of its assignor. FDIC v. Bledsoe, 989 F.2d 805, 810 (5th Cir. 1993); Jackson, 883 S.W.2d at 174. On January 14, 1994,

the RTC, while acting as receiver for Victoria Savings Association, transferred the Note and Guaranty Agreement along with all right, title, and interest therein to Plaintiff Premier. Since Premier brought this cause of action to recover amounts owed and due under the Guaranty on December 16, 1994, Premier's action was not barred by FIRREA's six-year limitations period which expired in June 1995. Therefore, Defendant's contention that Texas's four-year statute of limitations period bars Plaintiff/s suit fails as a matter of law.

In addition, Defendant contends that the limitations period in TEX.PROP CODE ANN. § 53 001 et seq. (Vernon 1995) bars Plaintiff's suit Section 53 of the Texas Property Code applies to mechanic's, contractor's or materialman's liens. As a matter of law, the Court finds that these provisions are not relevant Plaintiff's cause of action as this case does not involve a mechanic's, contractor's or materialman's lien.

The Court notes that Defendant may have made a typographical error when he cited Section 53.001 et seq. in his pleading. Possibly, Defendant intended to cite TEX.PROP.CODE. ANN. § 51.003 (Vernon 1995). Section 51 et seq. would be relevant to this case as it contains general lien provisions and since § 51.003 is a statute of limitations provision. Section 51.003 provides that, if real property is sold at a foreclosure sale for a price less than the unpaid balance of the indebtedness securing it, "any

action brought to recover the deficiency must be brought within two years of the foreclosure sale and is governed by this section." TEX.PROP.CODE.ANN. § 51.003 (Vernon 1995).

Assuming arguendo that Lundquist actually intended to argue that section 51.003 bars Plaintiff's suit, this contention fails as a matter of law. As established earlier, Premier is an assignee of the RTC, and accordingly, benefits from the six-year statute of limitations in § 1821(d)(14). Jackson, 883 S.W.2d at 174; Trunkhill Capital Inc. v. Jansma, 905 S.W.2d 464, 467-469 (Tex App.--Waco 1995, n w.h.).

(b) Equitable Doctrine of Laches Defense

In the alternative, Defendant contends that if the statute of limitations does- not bar Plaintiff's suit, then the equitable doctrine of laches precludes Plaintiff's cause of action.

Under Texas law, laches is an affirmative defense that must be considered in light of the facts of each case. A defendant asserting laches as a defense must plead and prove (1) an unreasonable delay in bringing a claim and (2) detrimental good faith change of position because of the delay. Clark v. Amoco Production Co., 794 F.2d 967, 971 (5th Cir. 1986). Texas law provides that doctrine of laches does not apply to an action that comes within the provisions of a particular statute of limitations. Id. at 972; FDIC v. Spain, 796 F.Supp. 241,

243 (W.D. Tex. 1992); Transportation League. Inc. v. Morgan Express Inc., 436 S.W 2d 378, 388 (Tex.Civ.App.--Dallas 1969, ref. n.r.e).

In the instant case, the six-year statute of limitations in 12 U.S.C § 1821(d)(14) applies to Premier's cause of action. Bledsoe, 989 F.2d at 810. This period did not expired when Premier brought this suit. Therefore, as a matter of law, the doctrine of laches is unavailable as a defense. Clark, 794 F 2d at 972.

(c) Wrongful Foreclosure Defense

As an affirmative defense, Defendant contends that the predecessor to the Guaranty conducted an improper foreclosure sale in violation of TEX.PROP.CODE ANN. § 51.002 (Vernon 1995).

However, a guarantor's right to insist upon the proper disposition of realty securing a promissory note can be waived Long v. NCNB-Texas Nat'l Bank, 882 S.W 2d 861, 869 (Tex App.Corpus Christi 1994, n w.h.) (citations omitted) See also. FDIC v Coleman, 795 S.W.2d 706, 710 (Tex. 1990). Notice of sale to be made in connection with foreclosure can be waived contractually Micrea Inc. v Eureka Life Ins Co of Am , 53 S.W.2d 348, 356 (Tex.Civ.App.--Fort Worth 1976, ref n r.e.).

Plaintiff contends that Defendant waived the defense of irregular or wrongful foreclosure under the clear terms of the Guaranty Agreement. The clear language of the Guaranty provides:

Guarantors hereby agree that the Lender may, from time to time without notice to the Guarantors, at its discretion, and with or without valuable consideration, renew, extend or change the time of payment and/or the manner, place or terms of payment of said promissory note, or any part thereof, allow substitution or withdrawal of any collateral, or may release any security held in connection with said promissory note or any person or party liable thereon; and the exercise by the Lender of any right or power conferred upon it by any agreement with any of the Borrowers or with any of the Guarantors individually, or with any other person or party, shall be wholly discretionary with the Lender, and such exercise of, or failure to exercise, such right or power shall in nowise impair or diminish the obligations and liability of the Guarantors hereunder.

The Lender, its successors and assigns, shall not be liable for failure to use diligence in collection of any amounts due or which may become due under the terms of said promissory note hereby guaranteed, or in presuming the liability of any person under said promissory note or this guaranty; and the Guarantors hereby expressly waive notice to the Guarantors of the acceptance of this guaranty, presentment for payment, notice of dishonor, notice of protest, and protest of said promissory notice, diligence in bringing suit against any person, natural or artificial, liable on said promissory note or this guaranty, and waive notice of and consent to any of

> forbearance by the Lender any renewal, extensions, rearrangement or assignment of said promissory note.

(Pl 's Mot. Summ. J. Ex. A-2, Guaranty Agreement at 2).

The Court finds that the preceding provisions demonstrate that Defendant relinquished his rights to insist upon proper disposition of the collateral securing the promissory note Under Coleman and Long , supra, such an explicit disavowal of any interest in the security precludes the right to object to the manner of the collateral's disposition. Therefore, under the clear terms of the Guaranty Agreement, the Court finds that Defendant contractually waived his rights to insist upon proper disposition of the realty securing the Note or notice of the foreclosure sale.

(d) Usury

This affirmative defense also fails as discussed earlier by the Court in section III., subsection B.

IV. CONCLUSION

For the Forgoing reasons, the Court hereby GRANTS

Plaintiff's Motion for Summary Judgment on Defendant's counterclaim against Plaintiff for usury, and on its entire claim against Defendant

SIGNED and ENTERED on this 4th day of December 1995.

/s/ Janis Graham Jack
JANIS GRAHAM JACK
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

PREMIER FINANCIAL SERVICES - TEXAS, L.P., Plaintiff	§	
	§	C.A. No. C-94-545
VS.	§	
WAYNE A. LUNDQUIST, JR. and JAMES E. GUNN, Defendants.	§	

ORDER GRANTING MOTION TO CORRECT FINAL JUDGMENT

On this 28th day December 199 __ , came on to be considered Plaintiff's Motion to Correct Final Judgment, and the Court, after having considered the same, is of the opinion and finds that the Motion is with merit and should be GRANTED; it is therefore

ORDERED that Plaintiff's Motion to Correct Final Judgment is hereby GRANTED in its entirety; it is further

ORDERED that Plaintiff's Motion for Default Judgment, as reurged by Plaintiff, against Defendant James E. Gunn is hereby granted; it is further

ORDERED that the Final Judgment entered in this cause on December 6, 1995 is hereby amended to add the following:

In accordance with the Court's Order Granting Plaintiff's Motion for Summary Judgment, it is ORDERED, ADJUDGED AND DECREED that Plaintiff, Premier Financial Services - Texas, L.P., have and recover, from Defendants, Wayne A. Lundquist, Jr. and James E. Gunn, jointly and severally, judgment for:

1. Six Hundred Six Thousand Three Hundred Forty-Five and 08/100 Dollars ($606,345.08);

2. (Deleted by Judge).

3. Post-judgment interest on the judgment at the rate of five and 45/100 per cent (5.45%) per annum from date of judgment until paid; and

4. Costs of court;

for all of which let execution issue.

SIGNED this 28th day of December, 1995.

/s/ Janis Graham Jack
JANIS GRAHAM JACK
UNITED STATES DISTRICT JUDGE

Order submitted by:

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

PREMIER FINANCIAL SERVICES - TEXAS, L.P., Plaintiff	§	
	§	C.A. No. C-94-545
VS.	§	
WAYNE A. LUNDQUIST, JR. and JAMES E. GUNN, Defendants.	§	

FINAL JUDGMENT

In accordance with its Order Granting Motion for Summary Judgment, the Court enters final judgment dismissing this cause.

Final Judgment is rendered.

Signed on the 4th day of December, 1995.

/s/ Janis Graham Jack
JANIS GRAHAM JACK
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

PREMIER FINANCIAL SERVICES - TEXAS, L.P., Plaintiff	§	
VS.	§	C.A. No. C-94-545
WAYNE A. LUNDQUIST, JR. and JAMES E. GUNN, Defendants.	§	

ORDER DENYING DEFENDANT'S MOTION FOR LEAVE TO FILE FOURTH AMENDED ANSWER, AFFIRMATIVE DEFENSES, AND TO REFILE SECOND AMENDED COUNTERCLAIM

On this date came on to be considered a Motion for Leave to File Fourth Amended Answer, Affirmative Defenses, and to Refile Second Amended Counterclaim by Defendant Wayne A. Lundquist, Jr. ("Lundquist") filed November 27, 1995.

The deadline for amendment of the pleadings on the scheduling order was set for July 21, 1995. Defendant has not shown this Court "good cause" for modifying the scheduling order's deadline for amendment of the

pleadings. See, Fed.R.Civ.P. 16(b); Spiller v. Ella Smithers Geriatric Ctr, 919 F.2d 339, 343 (5th Cir. 1990). Defendant has further failed to comply with the Court's order of November 20, 1995.

For the forgoing reasons, the Court DENIES Defendant's Motion.

SIGNED and ENTERED on this the 4th day of December 1995.

/s/ Janis Graham Jack
JANIS GRAHAM JACK
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

PREMIER FINANCIAL SERVICES - TEXAS, L.P., Plaintiff	§	
	§	C.A. No. C-94-545
VS.	§	
WAYNE A. LUNDQUIST, JR. and JAMES E. GUNN, Defendants.	§	

ORDER

On February 14, 1995, Plaintiff Premier Financial Services Texas, L.P. ("Premier") moved to dismiss Defendant Wayne A. Lundquist Jr.'s ("Lundquist") counterclaim and affirmative defenses in his original answer.

On April 21, 1995, the Court granted Defendant Wayne Lundquist Jr.'s ("Lundquist") oral motion to withdraw all of his counterclaims against Plaintiff Premier. The Court also ordered Defendant Lundquist to respond to Plaintiff Premier's motion to strike Defendant's affirmative defenses on or before April 28, 1995.

However, Defendant did not respond to Plaintiff's motion to strike on April 28, but instead requested an extension of two business days to file a brief which this Court granted on May 4, 1995. Rather than filing a response brief as ordered by the Court, on May 4, 1995, Defendant Lundquist moved unopposed for leave to file first amended answer, affirmative defenses, and counterclaim ("first amended answer") with a certificate of conference dated May 4, 1995. In this motion, Defendant indicated that he intended to withdraw his counterclaims of breach of contract and wrongful foreclosure. Defendant also indicated that he intended to omit the affirmative defenses of failure of consideration, estoppel, and laches.

On May 5, 1995, Plaintiff Premier moved unopposed for leave to file second amended complaint ("second amended complaint") in order to add a party defendant, James E. Gunn ("Gunn"). The certificate of conference is dated May 4, 1995.

On June 14, 1995, this Court granted Premier's motion for leave to file second amended complaint which only added an additional defendant, and granted Defendant's motion for leave to file first amended answer.

On September 20, 1995, Plaintiff Premier moved for summary judgment on its entire claim against Defendant Lundquist and on Defendant Lundquist's counterclaim against Premier for usury.

On September 21, 1995, Defendant Lundquist filed, without moving for leave, a second amended answer and affirmative defenses ("second amended answer"). The deadline for amendment of the pleadings was July 21, 1995. Defendant Lundquist filed the second amended answer in an apparent attempt to circumvent the scheduling order, and add additional defenses and counterclaims.

On October 4, 1995, Premier moved to strike the second amended answer. On November 2, 1995, this Court held a hearing on Plaintiff's motion to strike Defendant's second amended answer. The Court hereby GRANTS Plaintiff's motion to strike Defendant's second amended answer for the reason that Defendant failed to move for leave to amend or to show good cause for modifying the amendment of pleadings deadline in the scheduling order.

On November 3, 1995, Defendant filed a third amended answer and affirmative defenses, and second amended counterclaim ("third amended answer"), without leave to amend, and which did not comply with the Court's oral ruling on November 2, 1995. On November 9, 1995, Plaintiff moved to strike Defendant's third amended answer. At a hearing on November 20, 1995, and in an order signed on that date, the Court GRANTED Plaintiff's motion to strike third amended answer.

On November 27, 1995, Defendant moved for leave to file a fourth amended answer which contained new affirmative defenses ("fourth amended answer). The fourth amended answer appears to be a refiling of the third amended answer which was struck as it did not comply with the Court's order of November 20, 1995.

On November 29, 1995, Defendant supplemented his motion for leave to file the fourth amended answer by seeking to withdraw the reference to the defense of waiver in the fourth amended answer. However, the fourth amended answer stilled contained affirmative defenses not allowed by this Court pursuant to its ruling on November 2, 1995, and order signed November 20, 1995. In particular, Defendant failed to comply with this ruling and order in that he added the affirmative defenses of satisfaction by performance, material alteration, release of the guaranty, and equitable estoppel. Defendant has repeatedly attempted to add defenses and counterclaims after the deadline for amendment of the pleadings and after direct orders from this Court to plead only certain defenses, and the counterclaim for usury.

The Court DENIES Defendant's motion for leave to amend fourth amended answer for failing to show good cause for modifying the scheduling order's deadline for amendment of the pleadings and for failure to comply with the Court's order of November 20, 1995.

SIGNED this the 4th day of December 1995.

/s/ Janis Graham Jack
JANIS GRAHAM JACK
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

PREMIER FINANCIAL SERVICES - TEXAS, L.P., Plaintiff	§	
	§	C.A. No. C-94-545
VS.	§	
WAYNE A. LUNDQUIST, JR. and JAMES E. GUNN, Defendants.	§	

ORDER DENYING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

On this day came on to be considered Defendant Wayne A. Lundquist, Jr.'s ("Lundquist") Motion for Partial Summary Judgment on his affirmative defense of discharge and on his counter claim of usury against Plaintiff Premiere Financial Services-Texas, L.P. ("Premiere"). For the reasons hereinafter discussed, the Court DENIES the Partial Motion for Summary Judgment urged by the Defendant.

I. JURISDICTION

This Court has jurisdiction on the basis of the diversity of citizenship of the parties, pursuant to 28 U.S.C. § 1332.

II. FACTS AND PROCEEDINGS

On October 24, 1983, Nueces Development Company ("Debtor") executed and delivered to Victoria Savings Association a Promissory Note ("Note") whereby Nueces Development Company promised to pay unto the order of Victoria Savings Association the principal sum of $793,000.00, together with interest thereon on or before the expiration of 365 days from the date of the execution of the Note. The Note was subsequently extended and renewed by various extension and renewal agreements dated November 21, 1984, July 24, 1984, July 22, 1986, and March 30, 1987. Pursuant to the terms of the last extension and renewal agreement, the Note matured on September 19, 1987.

Also on October 24, 1983, Nueces Development Company executed and delivered a Deed of Trust Security Agreement Financing Statement, conveying to the Trustee for the benefit of Victoria Savings Association, and its successors and assigns, certain property (hereinafter "property") as security for the debt owed on the Note. Further, on that same date, Defendant Lundquist, along with others, by and through a Guaranty Agreement, individually guaranteed in writing the payment of the indebtedness evidenced by the note.

The Resolution Trust Corporation (RTC) was appointed conservator of Victoria Savings Association on June 29, 1989. On December 11, 1990, in its capacity as

conservator of Victoria Savings Association, the RTC made demand upon Nueces Development Company and Defendant Lundquist for payment of the Note. Both Nueces Development Company and Lundquist failed to meet such demand. As a result, the RTC proceeded with the foreclosure sale of the secured property pursuant to the terms of the Deed of Trust. The property sold at public auction for the sum of $161,028. After the application of the sale price to the unpaid balance on the Note, a balance of $606,345.08 remained due and owing on the Note, including principle, interest, and attorney's fees.

On January 14, 1994, the RTC as receiver for Victoria Savings Association, F.S.A., transferred the subject Note and Guaranty, along with all right, title and interest therein to Plaintiff Premier Financial Services-Texas, L.P. On December 16, 1994, Premier brought this cause of action to recover the amount owed and due plus interest against Defendant Lundquist based upon his guarantee of the note.

Lundquist filed the motion presently before the Court on June 16, 1995, to which Premiere responded on July 6, 1995. Lundquist alleges that Premiere is precluded from enforcing Lundquist's guaranty on anything other than the original note. Lundquist argues that the guaranty was not a continuing guaranty, nor did he assume liability for any modifications or extensions of

the original note made by the lender and related or unrelated third parties. Therefore, because the Note was extended and renewed, Lundquist contends that he is relieved of liability under the Guaranty Agreement. Lundquist further alleges that the Guaranty Agreement is usurious on its face, and, therefore, may not be enforced. Based on the alleged usurious nature of the Guaranty Agreement, Lundquist moves the Court for an affirmative recovery from Premiere.

Premiere contends that the arguments supporting Lundquist's Motion for Summary Judgment depend on an improper and strained construction of the Guaranty Agreement, and that, as such, the Motion should be denied.

III. DISCUSSION

A. Summary Judgment Standard

Summary judgment is proper, pursuant to FED. R. CIV. P. 56(c), when "the pleadings, depositions, answers to interrogatories, and admissions file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." A party seeking summary judgment bears the initial burden of informing the Court of the basis for its motion and of identifying those portions of the record and affidavits which evidence an absence of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). Once the movant has met its

burden, it is then incumbent upon the non-movant to show that disputed issues of fact remain. State Farm Life Ins. Co. v. Gutterman, 896 F.2d 116, 118 (5th Cir. 1990). The Court, in turn, must view all inferences from the evidence in the light most favorable to the non-movant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

The movant's summary judgment evidence must sufficiently indicate the failure of an essential element of the non-movant's claim. Celotex Corp., 477 U.S. at 322. A complete failure of proof on an essential element renders all other facts immaterial because there is no longer a genuine issue of material fact. Id. at 323. Rule 56(c) requires the Court to enter summary judgment if the evidence favoring the non-moving party is not sufficient for the jury to enter a verdict in his favor. Anderson, 477 U.S. at 249.

Because the claims on which Lundquist seeks summary judgment are an affirmative defense and a counter claim, respectively, the burden falls on Lundquist to conclusively prove the elements of his contentions in order to prevail on his Motion for Summary Judgment. In regard to Lundquist's discharge defense, he must prove 1) the existence of a material alteration to the original note; 2) a lack of consent on his part to such material alteration; and 3) that harm resulted from such alteration. Sonne v. Federal Deposit

Insurance Corporation, 881 S.W.2d 789, 793 (Tex. Civ. App.--Houston [14th Dist.] 1994, n.w.h.).

In order to prove his usury counter claim, Lundquist must demonstrate 1) that a loan of money occurred; 2) that an absolute obligation to repay the principal exists; and 3) that there exists an exaction from the borrower (or guarantor) of greater compensation than the amount allowed by law. Holley v. Watts, 629 S.W.2d 694, 696 (Tex. 1982).

B. Discharge

Lundquist argues that he has been discharged on his guaranty because the original note was extended and renewed. Lundquist relies on the language in the Guaranty Agreement which provides that Lundquist guaranteed only the payment of "...that *certain promissory note* of even date herewith executed by the Borrowers and payable to the Lender..." in order to establish that he guaranteed only the original note and not any extensions or renewals thereof.

Lundquist contends that the Guaranty Agreement does not require, nor did Lundquist otherwise agree, that he would become liable on any of the future contract agreements between the Lender and third parties, including contracts in the form of renewals or extensions of the original note. Lundquist further asserts that the renewal and extension provisions of the Guaranty Agreement does not waive his discharge defense but

simply allows the Lender to enter into extension and renewal agreements without notice to the Guarantor, and without affecting Lundquist's liability under the original promissory note. The Court disagrees.

It is well settled under Texas law that the guarantor of a note is discharged from his obligation to answer for that debt if the creditor grants an extension of time for the payment of the note to the principal debtor. Federal Deposit Ins. Corp. v. Woolard, 889 F.2d 1477, 1479 (5th Cir. 1989); United States v. Vahlco Corp., 800 F.2d 462, 465 (5th Cir. 1986). There are, however, two exceptions to this general rule. First, a guarantor will not be discharged if his guaranty is a continuing guaranty which encompasses future renewals or extensions. Woolard, 889 F.2d at 1479; Holland v. First Nat. Bank in Dallas, 597 S.W.2d 406, 409 (Tex. Civ. App.--Dallas 1980, writ dism'd). Second, a guarantor may expressly consent to future renewals or extensions and thereby waive any discharge defense. Woolard, 889 F.2d at 1479; Sonne v. Federal Deposit Ins. Corp., 881 S.W.2d 789, 792 (Tex. Civ. App. -- Houston [14th Dist.] 1994, n.w.h.).

With respect to the first exception to the general rule, the language of the Guaranty Agreement expressly limits Lundquist's guaranty to "that certain promissory note". As a result, the guaranty can not qualify as a continuing obligation and the exception does not apply. See Woolard, 889 F.2d at 1479 (holding that language

guaranteeing "that one certain promissory note" did not contemplate a future course of dealing as required by a continuing guaranty). However, the second exception to the general rule is not so easily disposed.

In order to determine whether Lundquist did or did not consent to future extensions and renewals of the Note, it becomes necessary to strictly interpret the language of the Guaranty Agreement along with the language of the Note, and to resolve any ambiguity in favor of Lundquist. See Commons West Office Condos Ltd. v. Resolution Trust Corp., 5 F.3d 125, 127 (5th Cir. 1993) (construing together note and guaranty that were executed contemporaneously as part and parcel of same transaction); Resolution Trust Corp. v. Cramer, 6 F.3d 1102, 1106 (5th Cir. 1993) (interpreting any uncertainty as to meaning of contract of guaranty in favor of guarantor). Because both the Guaranty Agreement and the Note are worded in such a way as to convey a definite legal meaning, the Court finds that it is not ambiguous and will construe it as a matter of law. Coker v. Coker, 650 S.W.2d 391, 393 (Tex. 1983).

The Guaranty Agreement contains the following provision regarding extensions and renewals:

> "Guarantors hereby agree that the Lender may, from time to time without notice to the Guarantors, at its discretion, and with or without valuable consideration, renew, extend or change the time of payment and/or the

manner, place or terms of payment of said promissory note, or any part thereof...; and the exercise by the Lender of any right or power conferred upon it by any agreement with any of the Borrowers or with any of the Guarantors individually, or with any other person or party... *shall in nowise impair or diminish the obligations and liability of the Guarantors hereunder."* Guarantee Agreement, p. 2, ¶ 2 (emphasis added).

The Guaranty Agreement continues as follows:

"...Guarantors hereby...waive notice of and *consent to any act of forbearance by the Lender, any renewal, extensions,* rearrangement or assignment of said promissory note." Guarantee Agreement p 2 fl (emphasis added).

Further, the Promissory Note itself states that

"All.. guarantors...waive...defense on account of the extension of time of payments or change in the method of payments, and *consent to any and all renewals and extensions* in the time of payment hereof..." Promissory Note, p. 2, ¶, 2 (emphasis added).

The language of the Guaranty Agreement and the Note is abundantly clear. The agreement between the lender and the guarantors in this case accounted for any potential extensions and renewals of the Note, and, quite obviously, intended to maintain the validity of the

individual guaranties in spite of such extensions and/or renewals.

Lundquist's argues that while the Guaranty Agreement established that the lender could extend and renew the note without notice to the guarantors, such extension and renewal was not consented to by the guarantors. This argument is without merit. See NCNB Texas Nat. Bank v. Johnson, 11 F.3d 1260, 1266 (5th Cir.) (modification did not affect liability when guarantor expressly waived notice of modifications), reh'g denied 19 F.3d 17 (5th Cir. 1994); Lenamond v. North Shore Supply Co., 667 S.W.2d 283, 286 (Tex. Civ. App.--Houston [14th Dist.] 1984, no writ) (waiver of notice of alteration resulted in implied consent to alteration). Furthermore, Lundquist has offered no explanation for the actual (and fatal) consent language contained in the Guaranty Agreement and in the Promissory Note.

Consent is determined on an individual basis according to the particular language of the guaranty. Federal Deposit Ins. Corp. v. Attayi, 745 S.W.2d 939, 944 (Tex. Civ. App.--Houston [14th Dist.] 1988, no writ). In the present case, by signing the Guaranty Agreement, Lundquist expressly agreed to incur liability for extensions and renewal of the original Promissory Note. Lundquist has failed to offer any competent summary judgment evidence suggesting a lack of consent on his part of any material alteration of the original note. As

such, Lundquist's Motion for Summary Judgment on his affirmative defense of discharge fails as a matter of law.

C. Usury

To support his counter claim of usury, Lundquist directs the Court's attention to language in the Guaranty Agreement providing that if the

> "...[b]orrowers are not liable, *for any reason,* for the amounts due or which may become due under the said promissory note...such facts shall in no manner affect the liability of the Guarantors hereunder, but the *Guarantors shall be and remain liable herein notwithstanding said Borrowers be not liable for such indebtedness,* and to the same extent as the Guarantors would have been liable if the indebtedness of said Borrower has been enforceable against them." Guaranty Agreement, p. 2, ¶ 4. (emphasis added by Lundquist).

Lundquist claims that the Guaranty Agreement is usurious because, as written, it provides for Lundquist's liability even if the Borrower has satisfied his obligations under the note. Such an interpretation of the Guaranty Agreement is unconvincing at best.

There is no evidence that, under the Guaranty Agreement, the guarantors would remain liable if the Note was paid in full by the Borrower. As Premiere correctly notes, the use of the words "amount due" and "indebtedness" in the above cited guaranty provisions

clearly indicate that the parties did not intend for the guarantors' liability to continue should the Note be paid.

Lundquist has offered the Court no credible evidence establishing that the Guaranty Agreement is usurious. Accordingly, his Motion for Summary Judgment on his counter claim of usury must fail as a matter of law.

IV. CONCLUSION

For the foregoing reasons, the Court is convinced that Defendant Wayne A. Lundquist, Jr. has failed to show an absence of a genuine issue of material fact in his affirmative defense of discharge and his counter claim of usury against Plaintiff Premiere Financial Services-Texas, L.L.P. Accordingly, Defendant's Motion for Partial Summary Judgment is hereby and in all things DENIED.

SIGNED AND ENTERED this the 24th day of July, 1995.

/s/ Janis Graham Jack
JANIS GRAHAM JACK
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

PREMIER FINANCIAL SERVICES - TEXAS, L.P., Plaintiff	§	
	§	C.A. No. C-94-545
VS.	§	
WAYNE A. LUNDQUIST, JR. and JAMES E. GUNN, Defendants.	§	

ORDER DENYING PLAINTIFF'S MOTION TO DISMISS DEFENDANT'S COUNTERCLAIM AND TO STRIKE AFFIRMATIVE DEFENSES

On this day came to be considered Plaintiff's motion (1) to dismiss Defendant Wayne A. Lundquist, Jr.'s ("Lundquist') Counterclaim, as set forth in the First Amended Answer, Affirmative Defenses, and Counterclaim and (2) to strike certain affirmative defenses alleged by Defendant Lundquist in his First Amended Answer as insufficient defenses. The Court, after consideration of Plaintiff's motions and pleadings on file, is of the opinion that both of Plaintiff's motions should be denied.

Accordingly, it is ORDERED that Plaintiff's Motion to Dismiss Defendant's Counterclaim and to Strike Affirmative Defenses is hereby and in all other things DENIED.

SIGNED AND ENTERED on this the 28th day of August, 1995.

/s/ Janis Graham Jack
JANIS GRAHAM JACK
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

PREMIER FINANCIAL SERVICES - TEXAS, L.P., Plaintiff	§	
	§	C.A. No. C-94-545
VS.	§	
WAYNE A. LUNDQUIST, JR. and JAMES E. GUNN, Defendants.	§	

ORDER

On September 20, 1995, Plaintiff Premier Financial Services, Texas, L.P., ("Premier") moved for summary judgment on its entire claim against Defendant Wayne A. Lundquist ("Lundquist") and on Lundquist's counterclaim against Premier for usury. Plaintiff's motion for summary judgment was written in response to Defendant's first amended answer, affirmative defenses, and counterclaim ("first amended answer"). On September 21, 1995, without leave of Court or Plaintiff's consent, Defendant filed a response to Plaintiff's second amended complaint, second amended answer, and affirmative defenses ("second amended answer"). The deadline for amendment of the pleadings was July 21,

1995. On October 4, 1995, Premier moved to strike the second amended answer.

On November 2, 1995, this Court held a hearing on Plaintiff's motion to strike Defendant's second amended answer and motion for summary judgment. At this hearing, the Court allowed Lundquist to file a supplemental amended answer on November 3, 1995, limiting his affirmative defenses to the following: (1) promissory estoppel; (2) laches; (3) usury; and (4) that the guaranty is not enforceable by its own terms. The Court also allowed Lundquist to file a counterclaim for usury. In addition, the Court ordered that Plaintiff shall be allowed to supplement its motion for summary judgment to address these affirmative defenses and this counter claim.

SIGNED AND ENTERED on this the 20th day of November, 1995.

/s/ Janis Graham Jack
JANIS GRAHAM JACK
UNITED STATES DISTRICT JUDGE